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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-848

JACK A. FUSARI, Commissioner of Labor of the State of Connecticut, Administrator, Unemployment Compensation Act,

Appellant,

—v.—

LARRY STEINBERG, CECIL PASKEWITZ, DELIA TRIANA and JUAN MIRANDA,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF *AMICI CURIAE* OF THE NATIONAL EMPLOYMENT LAW PROJECT, INC., *ET AL.*

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Interest of the *Amici*

The National Employment Law Project, Inc., Community Action for Legal Services, Inc. of New York, the Legal Aid Bureau of Baltimore, the Legal Aid Society of Cleveland, the Legal Services Center of Seattle, the Michigan Legal Assistance Program, the Neighborhood Legal Aid Society, Inc. of Richmond, and Texas Rural Legal Aid, Inc. respectfully request the leave of this Court to file the

accompanying Brief *Amici Curiae*. The consent of the parties to this appeal to the filing of this brief has been obtained.

The *amici* are interested in this case because each of the *amici* is a Legal Services Office funded by the United States Office of Economic Opportunity and each devotes most of its time to the representation of indigent individuals. Indigent clients bring numerous unemployment compensation cases to Legal Services Offices, often after benefits have been terminated without hearing, with the result that Legal Services Offices devote a very substantial amount of time to the representation of indigent unemployment compensation recipients.[1]

The summary termination of unemployment compensation benefits and the ensuing delay pending a fair hearing work a major hardship on these unemployment compensation recipients. Because the average wage in the United States in employment covered by unemployment compensation was but $155.30 per week in 1972,[2] and because, when one becomes unemployed, this income is replaced with a benefit which, in 1972, equalled, on the average, but 35.9% of the earned wage[3] and because even this modest

[1] In Maryland when unemployment compensation recipients receive notice of adverse action they also receive a notice (Form FSA-801) informing them that they may be entitled to free legal assistance, together with the addresses of the offices of the *amicus*, Legal Aid Bureau, Inc., of Baltimore. Approximately 25% of the caseload of the National Employment Law Project is made up of unemployment compensation matters in which it is cooperating with local Legal Services offices.

[2] See United States Department of Labor, Manpower Administration, *Unemployment Insurance Program Letter No. 1251 (Unemployment Insurance Financial Developments, 1972)* at Table 2.

[3] *Id.*

benefit is eliminated by summary benefit terminations, the *amici* frequently find themselves representing desperately poor clients whose benefits have been terminated without a hearing. The problem of these clients is further exacerbated by the long delays in scheduling fair hearings.

The summary termination of unemployment compensation benefits imposes additional financial burdens on those whose financial resources are greatly reduced by unemployment. The additional legal impediment imposed by shifting to the recipient the burden of securing a reversal of a summary adverse decision must not be countenanced in these circumstances. For these reasons the *amici* urge affirmance of the decision below.

Questions Presented

A. Does the Due Process Clause of the Fourteenth Amendment to the United States Constitution require a fair hearing prior to the termination of unemployment compensation?

B. Does Section 303(a) of the Social Security Act which requires payment of unemployment compensation "when due" and the provision for fair hearings require a fair hearing prior to the termination of unemployment compensation?

C. Under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, is the present Connecticut "seated interview" procedure an inadequate procedure for terminating unemployment compensation?

Counterstatement of the Case

The State of Connecticut, like other states, participates in the federal-state program of unemployment compensation established by Title III of the Social Security Act, 42 U.S.C. §§501 *et seq.* The Act provides that states participating in the program must include provision for:

> "(1) Such methods of administration . . . as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due; [and]
>
> • • •
>
> "(3) Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied." Social Security Act §303(a) [42 U.S.C. §503(a)].

The State of Connecticut has established procedures for making initial determinations of entitlement to unemployment compensation.[4] See Conn. Gen. Stat. ch. 567, §31-241

[4] Effective October 1, 1974, this procedure for making initial determinations will be further formalized. The Connecticut Unemployment Insurance Law was amended to provide that the "determination of eligibility by the Administrator or an Examiner shall be based upon evidence presented in person or in writing at a hearing called for such purpose." Conn. P.A. 339 §14, L. 1974 amending Conn. Gen. Stat. ch. 567, §§31-241 (1958). The Sponsor of the amendment indicated that it was intended to modify the Labor Commission procedure which provides "a notice to a claimant which says that he must appear at his preliminary hearing in order to establish his eligibility for unemployment compensation" Conn. State Sen. Proc. at 129 (May 7, 1974). The modification was designed to prevent reliance on telephone information to disqualify claimants at this initial stage and require the Commission to rely on presentations made in person or on the form the Commission sends to employers when the recipient attempts to establish eligibility. *Id.* The defendant-appellant has yet to promulgate regulations implementing this amendment.

(1958), as amended, Conn. P.A. 339 §14 L. 1974. Once a recipient has been determined to be eligible for compensation, however, that recipient may have his compensation terminated by Connecticut without a pre-termination hearing.

In approximately 60 to 70 percent of the terminations, a recipient's compensation is terminated for reasons not related to his previous employment, but because of a determination that the recipient has failed to be "able" to and "available" for work or to "make reasonable efforts to obtain work," Conn. Gen. Stat. ch. 567, §31-235(2) (1958) (App. 39a).[5] In these cases, which typically arise when the recipient reports to pick up his check, the recipient is given a "seated interview" as soon as a question as to his eligibility is raised (App. 38a). If the result of the seated interview is adverse to the recipient, his compensation check is withheld. There is no advance notice of the specific factual issues to be raised in this interview; no notification of the right to representation by counsel (or by anyone else); no notice of whatever opportunity may exist to present favorable witnesses and documents; and no opportunity to confront or cross-examine hostile witnesses (App. 38a, 184a, 185a-186a, 205a and 206a).[6] After this proceed-

[5] See 364 F. Supp. at 925, n. 7.

[6] There are two exceptions to this denial of a pre-termination hearing where the termination issue involves allegations of a recipient's failure to be able to and available for work or to make reasonable efforts to obtain work. The first typically arises where the recipient's previous employer raises an issue of the recipient's refusal of a job offer by that employer. The second arises where allegations that a claimant has refused to accept a job referral come from an employee of the Connecticut State Employment Service. In these two situations, Connecticut requires that the person making the allegation on which termination might be based be present at the seated interview. See, 364 F. Supp. 925-926. The form of these procedures, however, is not at issue in the instant case.

ing, in which benefit payments may be terminated, the recipient must resort to the appeal process in which a hearing is eventually held.[7] It was this seated interview procedure which was used to terminate the compensation payments of appellees.

Each of the appellees was initially determined eligible for benefits but was later denied benefits in a "seated interview" on the grounds of failing to make reasonable efforts to obtain work. Each requested a hearing and each received a hearing and a hearing decision after a time ranging from approximately six weeks, in the case of appellee Miranda, to six months, in the case of appellee Steinberg. Two of the three appellees were eventually found to have been eligible for benefits denied as a consequence of the seated interview (App. 39a-42a).

[7] In Connecticut there was, when this action was filed, a single level of appeal within Connecticut's Department of Labor from these "seated interview" terminations. Conn. Gen. Stat. ch. 567, §31-242, *as amended*, Conn. P.A. 339 §15, L. 1974. This appeal process was intended to extend to the recipient the fair hearing required by the Social Security Act, 42 U.S.C. §503(a)(3). The hearing was conducted by a Commissioner of the Connecticut Department of Labor. Conn. Gen. Stat. ch. 567, §31-242, *as amended*, Conn. P.A. 339 §15, L. 1974. The State Act was amended (see note 5 *supra*) to provide for a two-stage appeal procedure, the first of which would provide the hearing. Conn. P.A. 339 §§1, 2, 4, 9, 10, L. 1974. In the future "referees" will provide the hearings now conducted by the Commissioners. Conn. P.A. 339 §§1, 10, L. 1974.

Summary of Argument

There are four alternative bases for affirming the decision of the Court below: (1) Due process requires that fair hearings, with adequate provision for notice, preparation, representation by counsel, confrontation, cross-examination, and an impartial hearing examiner the scope of whose inquiry and decision must be limited by the specific contents of the notice, be held prior to termination of unemployment compensation. (2) The Social Security Act, which requires payment of unemployment compensation "when due," requires such hearings prior to benefit terminations where determinations not based on such hearings are erroneous in a substantial number of cases and there is a long delay between such determinations and a subsequent hearing decision. (3) The Social Security Act, which requires a "fair hearing," requires that such hearing be held prior to termination of unemployment compensation. (4) The decision of the Court below, which allowed the State of Connecticut a number of alternative ways of bringing its procedures into conformity with the requirements of due process, is fully justified in view of the inadequacy of Connecticut's present procedures and the ensuing delay prior to hearing decisions.

As to the first basis for affirming the decision below it becomes apparent through application of the traditional two-step due process analysis that unemployment compensation, as a statutory entitlement and as a contractual right, is a property interest protected by due process; and that in the process of weighing the competing interests a full due process hearing prior to the termination of com-

pensation is required to protect the recipient's crucial interest in early, adequate compensation.

Even more than welfare assistance, which was recognized as a property interest by this Court in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), unemployment compensation is a statutory entitlement grounded in federal and state statutes. More also than the many contractual rights already recognized as property interests by this Court, unemployment compensation payments, financed by insurance tax payments levied on employers, come to unemployed workers as a "contractual right."

In weighing the interests to determine the form of the hearing required by due process, it first becomes apparent that the State has only the slightest interest in summary benefit terminations since any benefit payments made pending a prior hearing must be paid not by the State but by the Connecticut Unemployment Trust Fund, which is financed wholly by employer payments. It is apparent that individual employers have no interest to protect because their accounts may not be charged for erroneous payments. By contrast the workers' need for compensation during periods of unemployment is most substantial. This was recognized by Congress and has been acknowledged by this Court, see *California Department of Human Resources Development* v. *Java*, 402 U.S. 121 (1971). It is also specifically recognized by Connecticut in its provision of dependents' allowances to unemployed workers, and is accentuated by the unavailability of welfare assistance for unemployed workers in Connecticut. This need is further accentuated by the eighteen-week delay between the termination of benefits and the hearing decisions which occurs in 90% of the cases, and the high reversal rate of those determinations in the hearings. Balancing these

interests requires provision of a full due process hearing prior to the termination of unemployment compensation.

As to the second and third bases for affirming the decision below, it is apparent that Congress had a three-fold purpose in mind when it enacted Title III of the Social Security Act: providing the worker with subsistence income during unemployment, stabilizing the economy by maintaining the workers' purchasing power, and allowing maximum ability to search for work.

To accomplish these goals, Congress provided in §§303 (a)(1) and (3) [42 U.S.C. §§503(a)(1) and (3)] that no state program would be certified by the Secretary of Labor unless it provided for payments "when due" and a "fair hearing" for all individuals denied unemployment compensation. In *California Department of Human Resources Development* v. *Java, supra,* this Court construed the phrase "when due" in §303(a)(1) to mean "at the earliest stage of unemployment that such payments were administratively feasible. . . . " 402 U.S. at 131.

The Court below, while considering whether Connecticut's present procedure allowing for the summary termination of compensation violated §303(a)(1), concluded that it did not in reliance on this Court's summary affirmance in *Torres* v. *New York State Department of Labor,* 405 U.S. 949 (1972). However, in so doing, it failed to attribute full significance to two important facts: the reversal rate of determinations of ineligibility rendered in a seated interview and the delay that occurs before a hearing decision. Both are significant because together they serve to deny compensation to many eligible recipients during the period that Congress intended them to receive compensation. A high reversal rate coupled with a long delay before a decision on appeal means that claimants incorrectly deter-

mined ineligible are without compensation during a substantial part of their periods of unemployment, if not all of it, contrary to Congress' intent that payments be made during unemployment.

The phrase "fair hearing," as used in the Social Security Act, has been administratively interpreted to require provision of prior hearings under six Titles of the Social Security Act. Common sense suggests that Congress intended to act consistently and that the phrase must have the same meaning in all Titles of the Act. Likewise, the traditional meaning ascribed to the phrase "fair hearing" establishes that Congress intended that the hearing occur prior to compensation terminations.

As to the fourth basis for affirming the decision below, the present Connecticut procedure for benefit terminations, such as those imposed on appellees, is defective in failing to provide notice, opportunity to prepare, opportunity for representation, opportunity for confrontation, opportunity for cross-examination and an impartial hearing officer. The Court below, in viewing this against the long delay before these due process requirements were provided, allowed the state four optional methods of remedying the defects of its procedures: (1) providing prior hearings, (2) providing hearings more rapidly, (3) increasing the due process protections available in the present termination procedure, or (4) paying benefits pending a hearing subject to recoupment. Thus the State was allowed to adopt any one or combination of these remedies. The infirmities of the present procedures, which often result in erroneous decisions and are only reviewed after a long delay, obviously required some remedial action and the Court responded with a fair range of alternative courses of action.

ARGUMENT

A. *Introduction*

The issues raised on this appeal are not novel to the lower federal courts or to this Court. In the past three years, four unanimous three-judge district courts[8] and one single-judge district court[9] have held that fair hearings prior to unemployment compensation terminations are required while one court of appeals, by a split decision,[10] and one three-judge district court, also by a split decision,[11] have held that prior hearings are not required. The Court below, while not requiring a prior hearing, did find Connecticut's present procedure to be inadequate to meet the requirements of due process.

Prior to the noting of probable jurisdiction in the instant appeal, three of the above cases were acted upon by

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[8] *Pregent* v. *New Hampshire D.E.S.*, 361 F. Supp. 782 (D.N.H. 1973) (three-judge court), *vacated and remanded for determination of mootness*, 42 U.S.L.W. 3651 (U.S. May 28, 1974); *Hiatt* v. *Indiana Employment Security Division*, 347 F. Supp. 218 (N.D. Ind. 1971) (three-judge court), *remanded for determination of mootness, sub nom., Indiana Employment Security Division* v. *Burney*, 409 U.S. 540 (1972); *Wheeler* v. *Vermont*, 335 F. Supp. 856 (D. Vt. 1971) (three-judge court); *Foard* v. *Ohio Bureau of Employment Services*, No. C 70-302 (N.D. Ohio 1971) (three-judge court).

[9] *Crow* v. *California Department of Human Resources*, 325 F. Supp. 1314 (N.D. Cal. 1970), *rev'd*, 490 F.2d 580 (9th Cir. 1973), *petition for cert. filed*, 42 U.S.L.W. 3439 (U.S. Dec. 28, 1973) (No. 73-1015).

[10] See note 9, *supra*.

[11] *Torres* v. *New York State Dept. of Labor*, 321 F. Supp. 432 (S.D.N.Y. 1970) (three-judge court), *vacated and remanded*, 402 U.S. 968 (1971), *previous decision adhered to*, 333 F. Supp. 341 (1971), *aff'd mem.*, 405 U.S. 949 (1972), *rehearing denied*, 410 U.S. 971 (1973).

this Court: two of the unanimous three-judge district court decisions requiring prior hearings were remanded by this Court for determinations as to mootness,[12] while the split three-judge district court decision in *Torres* v. *New York State Department of Labor* denying a prior hearing was summarily affirmed by this Court.[13]

Although this Court has never spoken on the merits of the unemployment compensation prior hearing issue, this Court's summary affirmance in *Torres* has not been without significance in the instant case. Constrained by a Second Circuit ruling requiring that full precedential weight be given to a summary affirmance by this Court,[14] the Court below found itself unable to hold that Connecticut's denial of a prior hearing violated the Social Security Act. However, the Court did distinguish *Torres* on the facts [primarily with regard to the inordinate delay in Connecticut between the date of the termination and the date of the fair hearings (see 364 F. Supp. at 934)], in applying the due process weighing test and concluded that due process requires more than Connecticut now extends to unemployment compensation recipients. The Court provided the State with a set of alternative modifications which would bring the State procedures into compliance with the requirements of due process. In reaching this result, the Court noted that were it "writing on a somewhat cleaner slate, [it] would have little difficulty in rejecting the reasoning of the district court in *Torres*, and concluding, largely for the reasons so ably set out by Judge Oakes in *Wheeler* v. *State of Vermont*

[12] See *Pregent* and *Burney* cited in note 8, *supra*.

[13] See note 11, *supra*.

[14] See *Doe* v. *Hodgson*, 478 F.2d 537, 539 (2nd Cir.), *cert. denied*, 414 U.S. 1096 (1973), cited by the three-judge district court below, 364 F. Supp. at 931.

[335 F. Supp. 856 (D. Vt. 1971) (three-judge court)], that the Connecticut unemployment compensation procedures here challenged conflict with both the Fourteenth Amendment and the Social Security Act." 364 F. Supp. at 931. This Court of course is not constrained by its summary affirmance in *Torres*, as was the court below. [Recently, this Court rejected a series of three summary affirmances in reaching its decision in *Edelman* v. *Jordan*, —— U.S. ——, 94 S. Ct. 1347, 1359 (1974).]

Unconstrained by *Torres*, this Court may now undertake a fresh analysis of the constitutional and statutory provisions relating to prior hearings in unemployment compensation. A fair reading of those provisions compels the conclusion that prior hearings are required in unemployment compensation. But at the very least, the modest requirements of the judgment of the Court below should be affirmed.

B. *The Due Process Clause of the Fourteenth Amendment and Section 303(a) of the Social Security Act Require a Fair Hearing Prior to the Termination of Unemployment Compensation*

1. The Termination of Unemployment Compensation Without a Prior Hearing Violates the Due Process Clause of the Fourteenth Amendment

In *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564 (1972), this Court held that the determination of due process requirements in any particular context involves a two-step analysis: In order "to determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the nature of the interest at stake." 408 U.S. at 570-571. Second, once an interest is found to be protected by due process, a "weighing process" is necessary to determine the form of hearing required by

due process to protect that particular interest. 408 U.S. at 470.

Application of this analytical approach to the instant case requires the conclusions: (a) that unemployment compensation, a statutory entitlement and contractual right, intended by Congress to be paid immediately "when due," is a property interest warranting due process protection; and (b) that when the interests of the State and employers are balanced against those of the unemployed worker the scale tips heavily in favor of the worker.

a. *Unemployment Compensation Is a Property Interest Protected by the Due Process Clause of the Fourteenth Amendment*

In *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564 (1972), this Court defined the parameters of those interests whose nature is sufficient to invoke the protections of due process. Noting that a person must have "more than an abstract need or desire . . . more than a unilateral expectation [for the property] . . . " the Court stated that the person "must, instead, have a legitimate claim of entitlement to it." 408 U.S. at 577. The Court continued:

> "Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Thus the welfare recipients in *Goldberg* v. *Kelly, supra,* had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so." 408 U.S. at 577.

Like welfare benefits, unemployment compensation is a public benefit program. Both welfare and unemployment compensation are joint federal-state programs administered primarily by the states;[15] and like welfare entitlement, entitlement to unemployment compensation is grounded in state statutes defining eligibility for compensation.[16] Another aspect of unemployment compensation is that it is to be paid to workers during a specific period of time—the period during which they are unemployed.[17]

Beyond its characteristics as a public statutory entitlement, unemployment compensation also has private con-

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[15] For example, 42 U.S.C. §§601 *et seq.*, provide for federal financial assistance to the states for the state administration of the AFDC Program so long as the states comply with the federal statutory conditions set forth therein.

Similarly, 42 U.S.C. §§901 *et seq.* and §§1101 *et seq.* provide for federal financial assistance to the states for the state administration of unemployment compensation so long as the states comply with the federal statutory conditions set forth therein.

[16] For example, AFDC benefits in Connecticut must be paid to any applicant where the following state statutory conditions of eligibility are met: The applicant seeking benefits for a dependent child must be unable to furnish suitable support therefor in his own home; each dependent child must be supported in a home in Connecticut and an applicant for aid must not have made an assignment or transfer of property for the purpose of qualifying for the award. Conn. Gen. Stat. ch. 302, §17-85 (1958), *as amended* (Supp. 1973). Further, a dependent child must be a needy child under the age of 18 who has been deprived of parental support or care due to death, continued absence from home, or mental or physical incapacity of a parent, and the dependent child must be living with a qualified relative in a place of residence maintained by one or more such relatives at his or their own home. Conn. Gen. Stat. ch. 302, §17-82 (1958), *as amended* (Supp. 1973).

Similarly, earned unemployment compensation in Connecticut must be paid to any applicant who meets the statutory conditions for eligibility. See Conn. Gen. Stat. ch. 567, §31-235.

[17] See generally, Hearings on H.R. 4120 before the House Committee on Ways and Means, 74th Cong., 1st Sess. at 214 (1935); H.R. Rep. No. 615, 74th Cong., 1st Sess. 7 (1935); S. Rep. No. 628, 74th Cong., 1st Sess. 12 (1935).

tractual characteristics flowing from its nature as a wage substitute. To the Congress that created it, unemployment compensation was not charity; rather it came to an unemployed worker as a "matter of right." [18] In fact, it was presented to Congress as a program that would create a "contractual right." [19] More recently Congress has characterized unemployment compensation as an "earned monetary entitlement." [20] Behind these characteristics is the reality: unemployment compensation payments are made from the Unemployment Trust Fund which is financed by employer contributions.[21] The right to such payments is thus also grounded in a contract—the employment relationship.

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[18] "The advantages of social insurance over public relief are many. It does not carry with it the stigma of charity with its devastating effect on the morale of our population and its loss of self-respect. The protection afforded by social insurance comes to the worker as a matter of right. It is contingent upon the previous employment and contributions of the worker himself and does not involve the social investigation and the means test which is inevitable in any system of public relief."

79 Cong. Rec. 5468 (1935) (remarks of Representative Doughton, Chairman of the House Ways and Means Committee).

[19] Report of the Committee on Economic Security, Hearings on S. 1130 before the Senate Committee on Finance, 74th Cong., 1st Sess. 1321-1322 (1935).

[20] See Report of the Senate Finance Committee on the Employment Security Amendments of 1970, S. Rep. No. 91-752, 91st Cong., 2nd Sess. 24 (1971), and Report of the House Ways and Means Committee on the 1970 Employment Security Amendments, H.R. Rep. No. 612, 91st Cong., 1st Sess. 19 (1969), both relating to unemployment compensation amendments to the Social Security Act.

[21] Initially, in nine states, not only the employers but also the employees themselves made contributions toward the unemployment compensation fund. See, E. Teple and C. Nowacek, *Experience Rating: Its Objectives, Problems and Economic Implications*, 8 Vand. L. Rev. 376, 380, n. 8 (1955), a practice still followed in two states: New Jersey, see N.J. Stat. Ann. 43:21-7(d)(1) (1962), *as amended* (Supp. 1974); and Alabama, see Code of Ala., Title 26, §202 (1940), *as amended* (Supp. 1974).

This Court has extended due process protection to both statutory and contractual property interests. The former type of property interest, such as statutory entitlements to welfare benefits, have regularly been accorded due process protection. See, *e.g.*, *Goldberg* v. *Kelly*, 397 U.S. 254 (1970); cf. *Flemming* v. *Nestor*, 363 U.S. 603 (1960) (Old Age Benefits).[22] Recent examples of the latter are the rights conveyed by installment sales contracts for such items as household furnishings at issue in *Fuentes* v. *Shevin*, 407 U.S. 67 (1972) and the wage payments at issue in *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969). Unemployment compensation being both a contractual right and a statutory entitlement is unquestionably a protected property interest.

The nature of this property interest is such that it is inextricably related to the time at which it is available. It is an entitlement to receive payments at a certain time, *i.e.*, during unemployment. See p. 28, *infra*. The property interest, by its very nature, is destroyed without due process if, once payments are found to be due, they are terminated during unemployment without a hearing first being held. There can be no doubt that unemployment compensation is a property interest protected by due process and that that interest is an interest in receiving payments at a specific time.

In fact, this Court has recognized in unemployment compensation an interest sufficient to require the protection

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[22] Writing for the Court nearly fifteen years ago in *Flemming* v. *Nestor*, 363 U.S. 603 (1960), Mr. Justice Harlan stated:

"[T]he interest of a covered employee under the [Social Security] Act is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause." 363 U.S. at 611.

of due process. Four years ago, it used entitlement to unemployment compensation as a springboard to find in welfare entitlement a property interest sufficient to invoke due process requirements:

> "Relevant constitutional restraints apply as must to the withdrawal of public assistance benefits as to disqualification for unemployment compensation." *Goldberg* v. *Kelly*, 397 U.S. 254, 262 (1970).

Certainly the converse of this proposition is equally valid.

b. *The Due Process Weighing Test Requires a Full and Fair Hearing Prior to the Termination of Unemployment Compensation*

Since unemployment compensation is a property interest sufficient to invoke the protections of due process, it is necessary to apply the "weighing process" to determine the form of the hearing required by due process to protect that interest. *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 570 (1972). The determination as to form generally includes provision for adequate notice, for presentation of evidence, for confrontation and cross-examination, for right to counsel or other representation, for an impartial decision-maker and for a decision based upon evidence. *Goldberg* v. *Kelly*, 397 U.S. 254, 271 (1970).

While this Court, following a long line of authority, has held that the hearing is always required prior to deprivation of a property interest, *Fuentes* v. *Shevin*, 407 U.S. 67 (1972),[23] more recent holdings suggest that the question

[23] This Court in *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, —— U.S. ——, 42 U.S.L.W. 4963 (U.S. May 15, 1974) recently acknowledged the validity of this *Fuentes* analysis by holding that postponement of notice and hearing is justified only in extraordinary situations.

of the proper timing of the hearing is also to be resolved in the weighing process, see *Mitchell* v. *W. T. Grant Company*, —— U.S. ——, 94 S. Ct. 1895, 1902 (1974); *Arnett* v. *Kennedy*, —— U.S. ——, 94 S. Ct. 1633 (1974) (Opinion of Justice Powell, 94 S. Ct. 1633 at 1651). Here, the choice of one rule or the other has no effect on the outcome: since there is a property interest, the *Fuentes* rule requires a prior hearing; since the interest of the recipient so far outweighs any competing interests, the later cases also require a prior hearing.

In applying the weighing test in the instant case, particularly as to the timing of the hearing, substantial guidance is provided by reviewing the competing interests accepted or rejected by this Court in several recent due process decisions. In *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969) (holding that notice and a hearing must be provided prior to garnishment of 50% of several weeks of a wage earner's wages), this Court concluded that the interests of a wage earning family in not being "driven to the wall" by the loss of wages outweighed the interests of the state in simply preferring a later hearing.

One year later, in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), this Court held that welfare recipients could not be deprived of their statutory benefits without a full due process prior hearing (including provision for notice, confrontation and cross examination, representation, an impartial decision-maker, and a decision based upon the evidence). Again the Court concluded that the financial need of the recipients outweighed the interests of the state in avoiding increased administrative costs and in paying its own monies to judgment proof recipients who may be ineligible for the statutory benefits.

The following year, in *Bell* v. *Burson*, 402 U.S. 535 (1971) (holding that a judicial hearing on the question of potential liability for an automobile accident was required before the license of an uninsured motorist could be temporarily suspended) this Court found that the interests of the holder of a driver's license in retaining that license outweighed the interests of the state in protecting an injured third party from the possibility of an unsatisfied judgment and in avoiding the additional administrative expense of providing the prior judicial hearing on the issue of liability.

And last Term in *Arnett* v. *Kennedy*, —— U.S. ——, 94 S. Ct. 1633 (1974) (holding that a full evidentiary hearing was not required prior to the suspension of a disruptive and unsatisfactory employee), Justices Powell and Blackmun pointed out in their concurring opinion that the employee's interest in uninterrupted employment was satisfied by the notice and partial hearing procedures provided prior to suspension and by the back pay award available upon reinstatement, and that the employee's interest in a full-scale prior due process hearing was outweighed by the government's interest and the public's interest in maintaining employee efficiency and discipline ("Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the workplace, foster disharmony, and ultimately impair the efficiency of an office or agency." 94 S. Ct. at 1651).

Two principles relevant to the instant case may be drawn from the foregoing cases: First, the need for the property interest must be concrete just as the government's failure to provide full due process procedures prior to the taking must also be based on a concrete need. Second, government efforts to avoid projected administrative expenses incurred

in providing the requirement of due process cannot alone outweigh the concrete needs of those with protected interests.

Closer examination of the interests to be weighed here compels the conclusion that the unemployed worker's need is great and virtually identical to that of the welfare recipient, while the competing interests are minimal. Looking first to the State's interests, it is apparent that the State cannot assert avoidance of administrative costs here when similar interests were outweighed by the driver's need in *Bell* v. *Burson, supra*, and the wage earner's need in *Sniadach* v. *Family Finance Corp., supra*. Here, the State would not even pay whatever increased administrative costs, if any, would occur.[24] Nor can the State assert a drain on its treasury from erroneously paid compensation, an interest which was truly present but insufficient in *Goldberg*, when compensation payments here emanate not from the State but from the employer-funded Unemployment Trust Fund.[25] Further, erroneously paid compensation may be recouped or set off from workers who subsequently survive their period of need and rejoin the labor force,[26] compare *Goldberg* v. *Kelly*, 397 U.S. 254, 266, where the recipients were assumed to be judgment-proof.

Nor do the employers have an interest sufficient to outweigh that of the recipient. First, assuming that there might be some slight increase in the general unemployment

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[24] 42 U.S.C. §502(a) provides for federal "payment to each state which has an unemployment compensation law [in such amounts as are] necessary for the proper administration of such law." The federal government is not harmed because it pays these amounts from a tax on employers.

[25] Conn. Gen. Stat. ch. 567, §31-263 (1958).

[26] Conn. Gen. Stat. ch. 567, §31-273 (1958), *as amended*, Conn. P.A. 339 §33, L. 1974.

compensation tax rate as a consequence of requiring prior hearings, the vague, generalized interest that all employers have, collectively, in maintaining a low contribution rate cannot outweigh the specific and direct harm to the individual recipient resulting from long, often erroneous, benefit denials. Under Conn. P.A. 536 §4, L. 1973, which establishes contribution rates, there is a possible general tax rate adjustment of from —.4% to a maximum of +.9% of taxable payrolls that affects the Fund as a whole. Employers have no more interest in this adjustment to the over-all contribution than a member of the general public has in any tax increase. Moreover, the ability of the State to recoup erroneous payments greatly reduces the possibility of rate increases resulting from provision of prior hearings.[27]

Second, the individual employer whose contribution rate will not be increased by benefit payments, see Conn. P.A. 536 §4, L. 1973, *amending* Conn. Gen. Stat. ch. 567, §31-225 (1958), does not have any real interest in delaying benefit payments pending a hearing. If the award was correct in the first place, there is obviously no harm to the employer. If it was erroneous, the employer is not harmed since the state may not charge benefits for which the recipient was ineligible to his account. See Conn. P.A. 536 §5, L. 1973. As Justice Douglas observed in *California Department of Human Resources Development* v. *Java*, 402 U.S. 121, 135 (1971):

> "An employer's account is not finally charged with benefit payments until after he has exhausted all appeals in the administrative chain and also obtained judicial review. If he wins at any appellate level, he is not charged with any benefits paid to his former employee pending his appeal."

The same is true in Connecticut.

[27] *Id.*

Unlike the recipient, the employer does not suffer immediate termination of an important, and, for many recipients, exclusive source of income. Thus, unlike the creditors in *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), and in *Mitchell* v. *W. T. Grant Co.*, —— U.S. ——, 94 S. Ct. 1895 (1974),[28] the employers here have no direct interest in the termination of benefits without prior hearings.

By contrast, the need of unemployed workers for their compensation is substantial. While it is true that eligibility for compensation is not based on a formal means test, as is welfare, it is also apparent that unemployment compensation, enacted during the Great Depression, is designed to remedy the frequently destitute circumstances of newly unemployed workers and their families. The severe

[28] The interests of the creditor in *Mitchell* v. *W. T. Grant Co.*, —— U.S. ——, 94 S. Ct. 1895 (1974), are particularly inapposite to the minimal interests of the individual employers in the instant case. In *Mitchell*, this Court noted four factors which weighed heavily in swinging the balancing process toward protecting the creditor's interests. First, the *Mitchell* creditor's interest was in merchandise whose resale value "will steadily decline as it is used [by the buyer] over a period of time;" thus the creditor's interest could be "irretrievably eroded" during even a short period of buyer possession pending a fair hearing. 94 S. Ct. at 1900. Second, the Court noted that, "there is the real risk that the buyer . . . will conceal or transfer the merchandise to the damage of the seller." 94 S. Ct. at 1900. By contrast, neither of these financial considerations are present in the instant case since the employer is concerned at most with a possible small future tax increase. See p. 22, *supra*. The third factor in *Mitchell* was the minimal "risk that the writ will be wrongfully issued by a judge." 94 S. Ct. at 1901. Here, however, not only is there no pretense of judicial safeguards, but moreover the record discloses that approximately 19–26% of the terminations *are wrong*. See note 35, *infra*. And, finally, in *Mitchell*, the buyer could "immediately have a full hearing . . . thus cutting to a bare minimum the time of creditor or court supervised possession." 94 S. Ct. at 1901. Again, by contrast, there is no immediate hearing here but rather an eighteen-week delay in ninety per cent of the cases. See note 32, *infra*.

financial need which serves as the basis for the unemployment compensation program was specifically recognized by this Court in *California Department of Human Resources Development* v. *Java*, 402 U.S. 121, 130-132 (1971) and in *Nash* v. *Industrial Commission*, 389 U.S. 235, 239 (1967), (where this Court emphasized that termination of unemployment compensation would cause the recipient to "risk financial ruin.")[29] It was also recognized by the Court below:

> "Recent statistics suggest that the average unemployment compensation recipient is hardly well-off. In 1970, the average wage covered by unemployment insurance in the United States was $141.09; in Connecticut, it was $149.76. The average weekly benefit in that year in the United States was $50.31, or 35.7% of the average covered wage; in Connecticut, it was $60.26, or 40.2% of the wage. United States Department of Labor, Handbook of Unemployment Insurance Financial Data 1938-1970 at 139 (1971)." 364 F. Supp. at 936, n. 26.

The argument that the resulting need is of less consequence because those found ineligible may be eligible for welfare, see *Torres* v. *New York State Department of Labor*, 321 F. Supp. 432 (S.D.N.Y. 1971), is particularly

[29] In *Java*, this Court stated:

"A kind of 'need' is present in the statutory scheme for insurance, however, to the extent that any 'salary replacement' insurance fulfills a need caused by lost employment." 402 U.S. at 130.

The Court also stated:

"Unemployment benefits provide cash to a newly unemployed worker 'at a time when otherwise he would have nothing to spend,' serving to maintain the recipient at subsistence levels without the necessity of his turning to welfare or private charity." 402 U.S. at 131-132 (footnote omitted).

inapposite in this situation. First, it is a highly questionable public policy to force those eligible for unemployment compensation by virtue of long attachment to the work force to become welfare recipients. See *California Department of Human Resources Development* v. *Java*, 402 U.S. 121, 131 (1971). It was precisely to avoid this result that Congress established the unemployment compensation program. See 79 Cong. Rec. 5468 (1935), quoted at note 29, *supra*. Second, Congress enacted the Social Security Act as a single comprehensive package of economic benefits. Different benefits were established for different purposes. The comprehensive scheme is frustrated to the extent that states, to avoid paying one type of benefit, adopt policies that require reliance on other types of benefits available under the Act. But this is the inevitable result of forcing reliance on welfare for long periods during which unemployment compensation is due, a particularly inefficient policy where erroneously withheld unemployment benefits will eventually be repaid, often long after the period of need expires. Finally, many unemployed workers are unable to qualify for welfare benefits in Connecticut. Since Connecticut does not participate in the Aid for Dependent Children-Unemployed Parent Program,[30] this form of welfare assistance is altogether unavailable to the unemployed. This means that families headed by unemployed males would not be eligible for federally-assisted welfare benefits in Connecticut.

[30] See 364 F. Supp. at 934. It should be noted that Connecticut by failing to participate in the AFDC-U Program places itself with the majority of the states. Recent statistics on AFDC-U participation reveal that of fifty-four jurisdictions, thirty do not participate while only twenty-four do. H.E.W. Social Rehabilitation Service, "Public Assistance Report, #50: Characteristics of State Public Assistance Plans, General Provisions—Eligibility, Assistance, Administration" (1973).

Further evidence of the financial need of unemployed workers and their families is found in the statistics on dependents' allowances, a flat grant payment for each dependent, which in Connecticut is added to the unemployment compensation payments normally received by the worker.[31] During the period July, 1972 to June, 1973, 149,895 new unemployed workers established their eligibility for benefits in Connecticut. *United States Department of Labor, Unemployment Insurance Statistics* Table 9, p. 16 (March-April, 1974). Of these, 33.6% received dependents' allowances. *Id.* at p. 16. Of those receiving such allowances, over 60% had two or more dependents and more than 40% had three or more dependents. *Id.* Table 10(a), p. 18. Dependents' allowances during this period totalled $7,929,164. *Id.* Table 11, p. 19. Connecticut's unemployment compensation program can hardly be characterized as one where compensation is granted on a basis divorced from need.

But the most compelling fact to be balanced in the weighing process may well be the eighteen weeks that elapse between a request for a hearing and a decision based on the hearing in 90% of the cases in Connecticut.[32] This long

[31] Conn. Gen. Stat. ch. 567 §21-234 (1958). See generally Becker, *Adequacy of the Benefit Amount in Unemployment Insurance* 53 (Upjohn Institute for Employment Research, May, 1961).

[32] This statistic and others were related in detail by the Court below:

> "The record indicates that of the 461 intrastate appeals disposed of in Connecticut during December of 1972, fully 414 took at least 101 days between the time an appeal was filed and the date a final decision was reached. Put in percentage terms, this means that about 89.8% of all appeals took over 100 days to decide. And, the figures indicate that 61.4% of all appeals take over 125 days to dispose of, while 29.5% consumed over 150 days before the Commissioner's decision. Figures from other months strongly suggest that the December figures are not unrepresentative." 364 F. Supp. at 934 (footnotes omitted).

delay altogether frustrates the intent of Congress "to give prompt if only partial replacement of wages to the unemployed, to enable workers 'to tide themselves over until they get back to their old work or find other employment without having to resort to relief.'" *California Department of Human Resources Development* v. *Java*, 402 U.S. 121, 131 (1971) (footnote omitted).

It is during the period of unemployment that the worker and his family experience the most severe level of deprivation. A subsequent lump sum payment of illegally withheld compensation, eighteen weeks later and at a time when the worker and his family may have extricated themselves from their poverty through new employment, does little to assist the unemployed worker and his family during their period of greatest need, and even less to satisfy the legislative intent of providing early compensation to the worker. But that is part of the definition of this property interest; it is an interest in receiving benefits while unemployed. This interest can be protected only by requiring a full and fair due process hearing prior to the termination of unemployment compensation.

2. The Termination of Unemployment Compensation Without a Prior Hearing Violates the "When Due" and "Fair Hearing" Requirements of the Social Security Act and Frustrates the Purposes of Congress in Establishing the Unemployment Compensation Program

a. *The "When Due" Requirement and the Congressional Purpose in Enacting the Social Security Act Require That Recipients Be Granted a Hearing Prior to Termination of Their Unemployment Compensation*

The Court below rejected the proposition that Connecticut's seated interview system violated the requirement of

42 U.S.C. §503(a)(1) that compensation be paid "when due," on the grounds that it was bound by this Court's summary affirmance in *Torres* v. *New York State Department of Labor*, 405 U.S. 949 (1972), see 364 F. Supp. 922, 937. Although this Court of course is not bound by its summary affirmance in *Torres*,[33] and thus may examine this issue anew, it is noteworthy that the Court below failed to attribute proper significance to two important facts in the instant case. First, the large number of reversals of Connecticut's seated interview determinations indicate that large numbers of unemployed workers to whom compensation is "due" are denied that compensation for periods which, because the delay in reaching most hearing decisions in Connecticut is greater than the average period of unemployment, are often as long as or longer than the period of eligibility (*i.e.*, the duration of unemployment or the entire period "when due").[34] Second, the purpose of the unemployment compensation program is frustrated both by long delays before payment of benefits and by the erroneous benefit terminations.

In establishing unemployment compensation, Congress sought to accomplish three objectives in the hope of lessening the deleterious effects of rising unemployment. Congress sought, first, to provide the unemployed worker with a subsistence income during his periods of unemployment. H.R. Rep. No. 615, 74th Cong., 1st Sess. 7 (1935); S. Rep. No. 628, 74th Cong., 1st Sess., 12 (1935); Statement of

[33] See discussion at p. 13, *supra*.

[34] The average length of unemployment covered by unemployment compensation in 1973 in Connecticut was 9.3 weeks. Connecticut State Department of Labor, *Department Bulletin* at 14-15 (Spring, 1973). By contrast, 90% of the cases reach a decision based on a hearing after 18 weeks have expired. See note 32, *supra*.

Federal Relief Administrator and Member of the Committee on Economic Security, Hearings on H.R. 4120 before the House Committee on Ways and Means, 74th Cong., 1st Sess., 214 (1935); Report of the Committee on Economic Security, Hearings on S. 1130 before the Senate Committee on Finance, 74th Cong., 1st Sess., 1321-1322 (1935); see also *California Department of Human Resources Development* v. *Java*, 402 U.S. 121, 130-132 (1971). A denial of compensation during a substantial portion of a worker's period of unemployment does not accomplish this purpose.

Second, Congress established the unemployment compensation program to stabilize the economy by maintaining the purchasing power of the unemployed worker. See H.R. Rep. No. 615, 74th Cong., 1st Sess. 7 (1935); *Java, supra*, 402 U.S. at 132-133. The intent of Congress to stabilize the economy was expressed by Senator Robert F. Wagner, sponsor of the Social Security Act, before the Senate Committee on Finance:

> "The chief merit of unemployment insurance, however, is that it will exert a profound influence upon the stabilization of industry . . . . The transfer of purchasing power by benefit payments when danger threatens will float the business ship off the shoals of depression to the seaway of prosperity." Hearings on S. 1130 before the Senate Committee on Finance, 74th Cong., 1st Sess. 2 (1935).

Obviously, "danger threatens" during the period of unemployment, not when it passes. Without payment of compensation during this period, neither the worker nor the economy can benefit.

Third, Congress through the unemployment compensation program sought to assist the unemployed worker in his search for employment. Commenting on this purpose of

the Social Security Act before the House Ways and Means Committee, the Federal Emergency Relief Administrator stated that:

> "[T]his [Act] covers a great many thousands of people who are thrown out of work suddenly. It is essential that they be permitted to look for a job. They should not be doing anything else but looking for a job. *We felt that in that period of 2½ to 3 months the beneficiaries should get an insurance benefit in cash.*" Hearings on H.R. 4120 before the House Committee on Ways and Means, 74th Cong., 1st Sess. at 214 (1935) (statement by Harry L. Hopkins, Federal Emergency Relief Administrator) (emphasis added).

During each week that compensation is denied, the unemployed worker's search for employment is inhibited.

In light of this three-fold purpose, this Court construed §303(a)(1) of the Act and concluded that:

> "[T]he word 'due' . . . means the time when payments are first administratively allowed as a result of a hearing of which both parties have notice and are permitted to present their respective positions; any other construction would fail to meet the objective of early substitute compensation during unemployment. Paying compensation to an unemployed worker promptly after an initial determination of eligibility accomplishes the congressional purposes . . . of avoiding resort to welfare and stabilizing consumer demands; delaying compensation until months have elapsed defeats these purposes. It seems clear therefore that [this] procedure, which suspends payments . . . after an initial determination of eligibility has been made, is not 'reasonably calculated to insure full payment of unemployment compensation when due.'" *California Department of Human Resources Development* v. *Java*, 402 U.S. 121, 133 (1971).

In *Java*, this Court found that termination of benefits upon an employer's appeal was very likely to deprive an eligible recipient of his benefits during his period of unemployment. 402 U.S. at 133-134. Similarly, the high reversal rate here[35] results in a substantial number of claimants being deprived of benefits to which they are rightfully entitled for a period which is longer than the average period of unemployment of 9.3 weeks in Connecticut. See note 34, *supra*.

In *Torres* v. *New York State Department of Labor*, 333 F. Supp. 341 (1971), *aff'd mem.*, 405 U.S. 949 (1972), *rehearing denied*, 410 U.S. 971 (1973), the Court concluded that, as the result of New York's benefit termination procedure, benefits could not be said to be "due" for purposes of 42 U.S.C. §503(a)(1) because the agency had determined them not to be "due." But this reasoning, if it is accepted, has no application here where so many of the seated interview decisions adverse to recipients are erroneous and benefits *are* due. Likewise, the delay in making hearing decisions means that recipients in Connecticut are forced to bear the risk of possible error during their unemployment. If there is a strong congressional policy favoring early payment of benefits, it would seem that benefits properly would be determined not to be due only in the ultimate, relatively error free hearing now provided by Connecticut.

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[35] The following figures were noted by the court below while discussing Connecticut's reversal rates:

> "For the period of July, 1971 to June 1, 1972, there were 6534 claimant appeals, and 1706 of those were resolved in favor of claimants for a reversal figure of about 21.6%. In the period from July, 1972 to October, 1972, there were 769 reversals out of 2959 claimant appeals, or about 26.0%. In the three-month period from January, 1973 through March, 1973, there were 1759 claimant appeals, and 342 reversals, or a rate of about 19.4%." 364 F. Supp. at 936, n. 28.

Thus it is only after the "fair hearing" required by Section 303(a)(3) of the Social Security Act that benefits can be terminated because no longer due.

As this Court stated in *California Department of Human Resources Development* v. *Java, supra*:

> "Probably no program could be devised to make insurance payments available precisely on the nearest payday following the termination, but to the extent that this was administratively feasible that must be regarded as what Congress was trying to accomplish." 402 U.S. at 130.

Consequently, any administrative procedure which unnecessarily postpones the receipt of compensation by eligible claimants frustrates "what Congress sought to accomplish." As California's procedure considered in *Java* was deficient in this respect, so too is Connecticut's.

To remedy this defect and to accomplish the objectives of the Social Security Act, the recipient of unemployment compensation must be afforded timely payments. This treatment can be achieved only by a hearing prior to termination to insure that all eligible recipients receive payments "when due," as Congress intended.

b. *Congress Intended That Recipients of Unemployment Compensation Be Provided With a Hearing Prior to Termination of Their Compensation*

As enacted, Title III of the Social Security Act specifically requires tha[t] states provide an "[o]pportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied." 42 U.S.C. §503(a)(3). Likewise, provision was

made in Titles I, IV-A, and X of the Act for fair hearings[36] in the benefit programs established by those Titles. The fair hearing provisions of these Titles and of the more recently enacted Titles XIV, XVI and XIX have been interpreted by the United States Department of Health, Education and Welfare ("H.E.W.") to require *prior* hearings that "meet the due process standards set forth in the United States Supreme Court decision in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970)." 45 C.F.R. §205.10(a)(1)(ii) (1973).

Under these programs, in "cases of intended action to discontinue, terminate, suspend or reduce assistance,"[37] the state or local agency must provide timely and adequate notice,[38] an opportunity for a hearing,[39] an impartial decision-maker,[40] opportunity for presentation of the recipient's case by the claimant or his representative[41] and opportunity for confrontation and cross-examination of adverse witnesses.[42] H.E.W. regulations also require that, in situations involving questions of fact, benefits be paid until a decision based on a hearing is rendered.[43]

This measurement of the state hearings established under the "fair hearing" requirement of the various Titles of the Social Security Act against the standards of due process

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[36] See §2(a)(4), 42 U.S.C. §302(a)(4) (old age assistance); §402(a)(4), 42 U.S.C. §602(a)(4) (aid to dependent children); §1002(a)(4), 42 U.S.C. §1202(a)(4) (aid to the blind).

[37] 45 C.F.R. §205.10(a)(4).

[38] *Id.*, §205.10(a)(4)(i) (1973).

[39] *Id.*, §205.10(a)(5).

[40] *Id.*, §205.10(a)(9).

[41] *Id.*, §205.10(a)(13)(ii).

[42] *Id.*, §205.10(a)(13)(vi).

[43] *Id.*, §205.10(a)(6)(i).

established in *Goldberg* v. *Kelly, supra,* is in consonance with the standards by which hearings were traditionally measured at the time Congress passed the Social Security Act. At the time of that enactment, it had been traditionally held that, for a hearing to comport with the requirements of due process, it must be held prior to the deprivation of property. See, *e.g., United States* v. *Illinois Central R.R.,* 291 U.S. 457 (1934) (hearing necessary before rate change by Interstate Commerce Commission can be effective); *Londoner* v. *City and County of Denver,* 210 U.S. 373 (1908) (due process hearing must be held prior to assessment of taxes by state administrative board); *Windsor* v. *McVeigh,* 93 U.S. 274 (1876) (due process hearing must be held prior to issuance of decree of condemnation); see also *McVeigh* v. *United States,* 78 U.S. (11 Wall.) 259 (1870).

There is no indication that Congress intended anything other than conformity with traditional notions of due process when it required a fair hearing for all persons denied unemployment compensation. As this Court stated in *Shields* v. *Utah Idaho Central Railroad Co.,* 305 U.S. 177 (1938), quoting from *Morgan* v. *United States,* 298 U.S. 468, 480 (1936):

> "The requirement of a 'hearing' has obvious reference to the 'tradition of judicial proceedings . . .' [T]he manifest purpose in requiring a hearing is to comply with the requirements of due process upon which the parties affected by the determination of an administrative body are entitled to insist." 305 U.S. at 182.

Traditionally a due process hearing occurs before the property in question is forfeited. *Board of Regents of State Colleges* v. *Roth,* 408 U.S. 564, 570, n. 7 (1973); *Fuentes* v. *Shevin,* 407 U.S. 67 (1972). There is little reason to believe

that Congress required fair hearings in unemployment compensation without requiring those hearings to comply with the requirements of due process. Indeed, as noted by this Court in *Greene* v. *McElroy,* 360 U.S. 474 (1959), in matters of statutory interpretation it is assumed "that Congress or the President intended to afford those affected by the action the traditional safeguards of due process." 360 U.S. at 507. Moreover, Congress must have intended to act consistently. Since there is certainly no indication that Congress intended the nature of the "fair hearings" established under each of the Titles of the Social Security Act to differ depending upon which federal agency administered the program, H.E.W.'s constitutionally correct interpretation of the fair hearing requirement of Titles I, IV-A, and X, which were enacted at the same time as Title III, must also be adopted with respect to the Title III "fair hearing" provision.

C. *The Court Below Properly Determined Present Connecticut Procedures to Be Inadequate Under the Due Process Clause of the Fourteenth Amendment*

The Court below declined to require the State of Connecticut to provide a full prior hearing. Instead, the Court provided the State with various alternative means of bringing its practice into conformity with the requirements of due process. The Court held that the State could, alternatively, provide expedited *de novo* hearings, provide initial hearing procedures meeting minimum standards of fairness or, where rapid and fair *de novo* review would be unduly burdensome, pay the disputed benefits while reserving the right to set such benefits off against future compensation payments, see 364 F. Supp. 922, 937-38. It also noted that the State could do away with the seated interview and pay benefits pending a hearing, see 364 F. Supp. 922, 936 n. 27.

In short, the Court found that the procedural inadequacy of Connecticut's present termination procedure, coupled with the long delays incident to the holding of hearings, resulted in a violation of due process. The Court did not adopt a rigid rule requiring full-scale due process prior hearings in all circumstances.

The Court reviewed the present procedure for benefit terminations and concluded that the procedure did not result in discharge of due process obligations because: (1) there was virtually no advance notice of the "seated interview" or of the precise issue which would be raised; (2) there was no opportunity to prepare arguments or present supporting witnesses and documents; (3) there was no opportunity to confront and cross-examine adverse witnesses; (4) there was no opportunity to consult counsel; and (5) the fact-finding examiner, not being limited by a precise notion of the charges against the recipient, could base his decision on a wide range of rationales not necessarily related to the issue originally presented to the recipient. See 364 F. Supp. 922, 935. Coupled with the inadequacy of this initial termination procedure, the Court relied upon the hearing decision delay as a further source for its concern with the treatment Connecticut accords recipients in the first instance. See 364 F. Supp. 922, 933-934. It also bears repeating that a very substantial proportion of the non-due process determinations are eventually reversed. On the basis of these factors and a balancing of the interests of the State and the recipient, the Court properly concluded that the State should make some of the adjustments it suggested.

In the circumstances, it would have been difficult for the Court to do otherwise. The record is replete with evidence that complex, subjective factual issues frequently arise at

the "seated interview" which results in benefit termination (App. at 54a-58a, 77a-82a, 117a-118a); see also 364 F. Supp. 922, 936. Yet this interview is hopelessly inadequate because:

(1) The unemployed worker is subjected to this interview without adequate advance notice although one of the basic requirements of due process is fair and adequate notice of the charges made, see, *e.g.*, *Goldberg* v. *Kelly*, 397 U.S. 254, 267-268 (1970). The recipient has no notice of the issues to be raised until he reports to the unemployment compensation office and even then receives no precise notice of the issues involved. 364 F. Supp. 922, 935. Moreover, the fact finder may go beyond the record of the interview in making his decision. 364 F. Supp. 922, 935. Since there are no fixed standards by which even the examiner can measure the accuracy of his determinations (App. 76a-77a) there is no possibility of adequate notice to the claimant as to the specific issues which may be raised against him.

The appellant attempts to find a remedy for this defect in the fact that the recipient has general knowledge that he must report every two weeks, Brief of Appellant at 16. Yet this notice is altogether inadequate because it is not until after the recipient arrives at the unemployment compensation office that he is informed of any specific alleged inadequacy in his search for work. As the State concedes, new factual issues can be raised when the recipient reports, Brief of Appellant at 14.

(2) Recipients are not provided with adequate opportunity for representation by counsel, although representation is also a basic requirement of due process, see, *e.g.*, *Goldberg* v. *Kelly*, 397 U.S. 254, 270-71 (1970) ("Counsel

can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient"); cf. *Powell* v. *Alabama,* 287 U.S. 45, 68-69 (1932). While it is true that there is no specific prohibition on representation by counsel here, Brief of Appellant at 21, neither is there any specific notice to the recipient that he has the right to counsel. It is not too speculative to suggest that the typical worker would not think of his need for counsel in the few minutes between his being informed that he must participate in a seated interview and the time that he moves to the head of the line for that interview. Even if he did think of it, there is no requirement that he be given time to obtain counsel before the interview. Appellant's claim that a worker may, if he chooses, bring counsel with him every time he reports, Brief of Appellant at 18, is not only patently ridiculous as suggested by the Court below,[*] but it also concedes the total absence of notice in the State procedure. What has been said of the opportunity to retain counsel is also true for the other elements of due process that require adequate opportunity for advance preparation such as the presentation of friendly witnesses and the presentation of documentary evidence.

(3) Recipients are also denied the right of confrontation and cross-examination, another necessary element of due process, see, *e.g., Goldberg* v. *Kelly,* 397 U.S. 254, 270 (1970) ("Welfare recipients must therefore be given an opportunity to confront and cross-examine the witnesses

[*] The Court below soundly rejected this claim by stating:

> "The claimant surely cannot be expected to bring counsel and witnesses to every bi-weekly claims session on the off chance that a 'seated interview' will result." 364 F. Supp. at 935, n. 25.

relied on by the department"); *Willner* v. *Committee on Character and Fitness,* 373 U.S. 96, 103-104 (1963); *Greene* v. *McElroy,* 360 U.S. 474, 496-497 (1959). The State's denial of confrontation and cross-examination is most vividly illustrated by the examiners' practice of gathering information against recipients by telephoning so-called uninterested employers, Brief for Appellant at 19, a practice which the State concedes provides "no opportunity for confrontation by the claimant." *Id.*

(4) Finally, the record also demonstrates the absence of an impartial decision maker, another basic requirement of due process, see, *e.g., Goldberg* v. *Kelly,* 397 U.S. 254, 271 (1970) ("of course, an impartial decision maker is essential"); *Gibson* v. *Berryhill,* 411 U.S. 564, 579 (1973); *In re Murchison,* 349 U.S. 133, 138 (1955); *Wong Yang Sung* v. *McGrath,* 339 U.S. 33, 45-46 (1950). In the Connecticut procedure, the seated interview examiner, although denoted a "Fact Finding Examiner," sits in the position of an inquisitor who seeks to elicit information which might indicate that the worker is not eligible for his compensation (App. 38a). Indeed, the lack of impartiality in this procedure is suggested by the State's own reference to the subsequent fair hearing procedure provided by the Unemployment Compensation Commission, which is described as "a completely independent entity separate and apart from the defendant and the Employment Security Division," Brief of Appellant at 5.

No doubt these procedural infirmities in the Connecticut seated interview have much to do with the high rate of error in decisions based on seated interviews. When they are viewed from the perspective of the recipients who must

wait long periods of time before being given the opportunity to fairly present their cases and endure the consequent hardship, the holding of the Court below emerges as a modest response to a clear-cut denial of due process.

As noted above, a balancing of the competing interests of the recipient and the employer tips decidedly in favor of the recipient. See, pp. 18-27 *supra*. *Amici*, like the Court below, have difficulty discerning what interests the State could possibly have sufficient to justify refusal to adopt that Court's proposals. Surely long delays in benefit payments do not help the State. Surely, too, an increase in the procedural proprieties at the seated interview would not be unduly burdensome. These points are necessarily true *a fortiori* since it has already been shown that the burdens incident to holding a prior hearing are not sufficient to outweigh the interest of the recipient in early and correct benefit determinations. Finally, to the extent the State follows the suggestion of the Court below that the State may comply with the requirements of due process by processing requests for hearings more expeditiously, the State will reduce the amount of benefits paid to recipients pending hearings.

In view of the hardships imposed by the present Connecticut procedures, the inadequacy of those procedures to meet minimal requirements of fairness, and the inconsequential burden imposed on the State by the decision of the Court below, the Court's modest proposals for securing due process rights to recipients are most appropriate and should be affirmed by this Court.

CONCLUSION

For the foregoing reasons the decision of the Court below should be affirmed.

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